IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 1367 OF 2004

Shri Shivaji M. Shinde ... Appellant (Ori.Plaintiff)

V/s

Shri Parashram B. Shinde ... Respondent (Ori.Defendant)

Mr. Vinod Jadhav holding for Mr. S.S. Pakale for the appellant.

Mr. A.B. VAgyani for the respondent.

CORAM: P.V. KAKADE, J.

DATED: 23RD AUGUST, 2005

P.C.:

1. The appellant has preferred this appeal against the judgment and order passed by the Addl. District Judge, Sangli, dated 27.10.2004 allowing the appeal of the defendant and setting aside the decree passed by the Trial Court in R.C.S. No. 51 of 1997, by which the suit came to be decreed and defendant was perpetually restrained from obstructing, interfering, ingress and egress in the suit property from other property.

2. I have heard the learned counsel for both parties.

Perused the record.

3. The plaintiff filed the suit for perpetual injunction against the defendant who hold adjacent property and that the plaintiff had right of ingress and egress to the extent of 4.5 ft. in width through C.T.S. No. 116 belonging to the defendant. According to the plaintiff, it was easementary right since their ancestors. C.T.S. No. 115 is owned by the plaintiff. It was alleged that, towards south side of the said property, there is a cattle shed. To the eastern side there is a protection wall and "Dindi Darwaja" and the said door is not being used for ingress and egress for the animals or the persons carrying water containers. The said road is not being used since his ancestors which is on the southern side for the ingress and egress for the cattle. It is the case of the plaintiff that plaintiff and his ancestors were using the way as shown in the hand sketch on the southern side of the. Both the houses of the plaintiff and defendant are facing towards eastern side. There is open land beyond the same. The plaintiff came with the case that defendant obstructed his right of way to have the cattle through the suit way and hence the suit.

4. The defendant contested the suit on various grounds inter-alia submitting that the allegation made by the defendant-plaintiff were not correct and there was no easementary right existing as alleged to pass the cattle from the so-called suit way, and sought dismissal of the suit.

5. The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that the plaintiff had proved that there is three hand width road since beginning at the south of shed of house No.115. It also recorded the finding to the effect that there is no way existing except the suit way and hence the plaintiff was held entitled for perpetual injunction against the defendant and suit came to be decreed.

6. The appeal was carried to the District Court, Sangli. The learned Addl. District Judge, after hearing both parties adjudicated the appeal on merits and came to the conclusion that the Trial Court had erred in holding that there was right of way vested in the plaintiff in the suit way and, as such, the appeal was allowed and the suit came to be dismissed. Hence the present appeal.

7. At the outset, it may be noted that there is absolutely no substantial question of law involved in this appeal. The existence of right of way is purely a question of fact which is seen to be adjudicated by the lower appellate Court holding that the plaintiff has failed to prove easementary right of way over the suit property. The learned counsel for the appellant submitted that the findings recorded by the lower appellate Court were perverse and, therefore, needed interference by this Court. However, in this regard, it must be noted that there are in all three maps involved in this case, one drawn by the plaintiff himself at the time of filing of the suit, second was that of the Court Commissioner with his report and the third was the City Survey map of the suit property. So far as the City Survey map is concerned, it is of no use because it does not show any right of way through the said defendant's property vested in the plaintiff. So far as the Court Commissioner's map is concerned, alongwith its report, the observations made by the Court Commissioner in his report are taken into account by the lower appellate Court which show that at the relevant spot there is a flowering plant and a bath-room with walls of loose stones which is quite evident. Therefore, if there is loose stone walled bath-room coupled with a flowering

plant, it cannot be said that both the aspects, namely, the flowering plant and loose stone walled bath-room are in existence for time immemmorial. On the basis of this aspect, the lower appellate Court has come to the conclusion that there is absolutely no way available for the plaintiff. The appellate Court has further proceeded to assess the evidence of agreement dated 25.3.1984 Exh.67 and has come to the conclusion that the document is unable to show that the plaintiff is entitled to the alleged right. In view of this position, I have no doubt whatsoever that the learned lower appellate Court has rightly appreciated the factual aspects of the evidence and it cannot be said that the reasoning adopted by the lower appellate Court is perverse in any manner.

8. Time and again the Apex Court, in the case of **Kondiba Dagadu Kadam v/s Savitribai Sopan Gujar, reported in A.I.R. 1999 SC 2213,** has observed that, in a case wherefrom a given set of circumstances two inferences are possible, one drawn by the lower appellate Court is binding on the High Court in second appeal. Adopting any other approach is not permissible and the High Court cannot substitute its opinion for the opinion of the first appellate Court unless it is found

that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court or was based upon inadmissible evidence. It is not within the domain of the High Court to investigate the grounds on which the findings were being drawn by the last Court of fact, being the first appellate Court. In view of these aspects, I am not inclined to interfere with the findings recorded by the learned lower appellate Court Judge as those relate to the issue of facts and, as such, find that there is no merit in the appeal and hence appeal deserves to be dismissed.

In the result, the appeal stands dismissed with no order as to costs. Consequently, Civil Application No. 1824 of 2004 also stands dismissed with no order as to costs.

9. At this stage, the learned counsel appearing for the appellant prays for stay of the order. In view of the facts and circumstances, the order stands stayed for six weeks.

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